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In the
Supreme Court of the United States

JOSEPH STROUD AND JOVON BROADCASTING,
WJYS-TV 62/34,
Petitioners,

v.

JERRI BLOUNT,
Respondent.

On Petition for Writ of Certiorari to
The Appellate Court of Illinois

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National Association of Black Owned Broadcasters ("NABOB") is a non-profit trade association organized and doing business under the laws of the District of Columbia. NABOB is the first and largest trade organization representing the interests of African-American owners of radio and television stations across the country. NABOB was organized in 1976 by a small group of African-American broadcasters who desired to establish a voice and a viable presence in the industry and to address specific concerns facing African-American broadcasters.

NABOB has two principal objectives: First, to increase the number of African-American owners of telecommunications facilities, and second, to improve the business climate in which they operate. The overall objective is to maximize the potential for financial success through providing advocacy resources and information in critical business areas including, advertising sales, station acquisition, financing, and

[1] Pursuant to Rule 37.3(a), counsel of record for Petitioner and counsel for Respondent below (no counsel of record for Respondent having yet entered an appearance before this Court) were notified of NABOB's intent to file an amicus brief 10 days prior to the due date of this amicus brief. Copies of the parties' consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. Petitioner Jovon Broadcasting, WJYS-TV, 62/34, as a member of NABOB, pays annual dues which are not allocated to any particular activity of NABOB.

federal broadcast regulation. In 1976, there were only 30 African-American owned broadcast facilities in the United States. Today, there are over 220.

Despite NABOB's many accomplishments, its work is never complete. Although constituting 14% of the total population, African-Americans own approximately 2% of all commercial broadcast licenses in the United States. Economic and political empowerment in the African-American community cannot be achieved without access and control over the mass media resources that impact our lives and the world. NABOB is dedicated to creating opportunities for success for African-Americans in the telecommunications industry.

Respondent Blount's counsel conditioned Ms. Blount's consent to the filing of this amicus brief on NABOB's disclosure of "any current or past relationship between NABOB and the petitioners, their companies or affiliated companies, or any officials or employees of those companies." July 20, 2010 letter from Robin Potter to Walter Diercks, submitted to the Clerk of the Court. As noted in footnote 1 above, Jovon Broadcasting, WJYS-TV, 62/34 is a dues paying member of NABOB and has been for many years. Petitioner Joseph Stroud was a member of the Board of Directors of NABOB from 1994 to 1999.

As the owner of a member of NABOB and as a former director, Mr. Stroud has participated in a number of NABOB-related activities and is well-known to many members and directors of NABOB, who have known him as an honorable and ethical broadcaster and business owner. This knowledge of

Mr. Stroud's personal integrity has heightened the concern of NABOB and its members. This conflict among the courts as to whether attorneys' fees can be considered in determining whether an award of punitive damages is constitutional has created uncertainty and an incentive to forum shop which may subject any business owner to wildly different liability depending on where a suit is brought.

As shown below, NABOB believes that this Court should grant the instant petition and resolve the conflict between the lower courts.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted because the lower courts have not consistently applied this Court's holding in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), with some courts holding that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio of punitive damages to compensatory relief under *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and with other courts permitting inclusion of attorneys' fees as compensatory damages for purposes of calculating the ratio under differing criteria for inclusion. Indeed, NABOB has identified two recent conflicting cases in addition to those cited by Petitioners, one from the United States Court of Appeals for the Eighth Circuit holding that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio, and the other from the United States Court of Appeals for the Ninth Circuit, holding that attorneys' fees can be

included as compensatory damages for purposes of calculating the ratio.

This conflict among the lower courts has real world consequences for defendants. If a defendant were to be successfully sued for compensatory damages, punitive damages and attorneys' fees, the amount of punitive damages that could be awarded consistent with this Court's holdings in *BMW* and *State Farm* could vary wildly, depending on where and in which court the NABOB member happened to get sued.

The fact that at least two conflicting decisions from the Eighth and Ninth Circuits have been issued so far in 2010 demonstrates that conflicting interpretations of this Court's holdings in *BMW* and *State Farm* are spreading to additional courts and that it is highly unlikely that the conflicts will be resolved without the intervention of this Court.

ARGUMENT

I. This Court Should Grant Certiorari to Resolve Inconsistent Decisions of the Lower Courts

Petitioners' petition for a writ of certiorari demonstrates that the lower courts have not consistently applied this Court's holding in *State Farm*, with some courts holding that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio of punitive damages to compensatory relief under *BMW*, with other courts permitting inclusion of attorneys' fees as compensatory

damages for purposes of calculating the ratio under differing criteria for when attorneys' fees can be included in the calculation. Indeed, as will be shown immediately below, the conflict among the lower courts is even worse than shown in Petitioners' petition.

NABOB has identified two conflicts among the lower courts in addition to those already identified in Petitioners' petition. In *Quigley v. Winter*, 598 F.3d 938 (8th Cir. 2010), the Eighth Circuit, in reviewing an award under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* and the Iowa Civil Rights Act, *Iowa Code ch. 216*, used a four to one ratio between compensatory damages and punitive damages to determine the constitutionally permissible punitive damages. The jury had awarded actual damages of $13,685 and punitive damages of $250,000. The trial judge awarded attorneys' fees and costs in the amount of $21,1587.50 and reduced the punitive damages to $20,527.50 (1.5 times the compensatory damages award of $13,685). *Quigley v. Winter*, 598 F.3d at 953.

The Eighth Circuit agreed that the punitive damage award of $250,000 was excessive because it was eighteen times the compensatory damages award of $13,685. *Ibid.*, 598 F.3d at 955. After completing its review of the three factors for assessing the reasonableness or excessiveness of a punitive damage award established by this Court in *BMW*, 517 U.S. at 575, 580-81 583, the Eighth Circuit concluded that punitive damages in the amount of $54,750 was appropriate: "This amount is four times greater than Quigley's compensatory damages ($13,685.00), which we find to be the appropriate ratio under the circumstances of this case." *Id.*, 598 F.3d at 955-56.

After approving punitive damages in the amount of four times the compensatory damages of $13,685, the Eighth Circuit then addressed the proper amount of attorneys' fees and costs to be awarded the plaintiff. The Court concluded that a reasonable amount of attorneys' fees in the case was $78,044.33 and instructed the district court to award the plaintiff $78,044.33 in attorneys' fees, together with $1,587.88 in non-taxable costs. *Id.*, 598 F.3d at 958. If the Eighth Circuit had included attorneys' fees as compensatory damages in its four to one ratio calculation for reasonableness, it would have reinstated the entire $250,000 in punitive damages awarded the plaintiff by the jury, since the ratio of the $250,000 to the total of compensatory damages and attorneys' fees ($91,729.33) was far less than four, and indeed was less than 2.75.

In the second case identified by NABOB, the Ninth Circuit has adopted the exact opposite of the approach used by the Eighth Circuit in *Quigley v. Winter*. In *Coker Equipment Co. v. Wittig*, 2010 U.S. App. LEXIS 2984 (9th Cir. February 16, 2010), the Ninth Circuit considered a case in which the district court did not award any compensatory damages for abuse of process, but instead only awarded attorneys' fees of $50,000 and $5,000 in costs, together with $20,000 in punitive damages. The Ninth Circuit held that attorneys' fees and costs "can constitute compensatory damages for abuse of process," and thus "the ratio of punitive damages to compensatory damages was not excessive." *Coker Equipment Co. v. Wittig*, 210 U.S. App. LEXIS 2984 at *8.

These two conflicting decisions cited above are in addition to the conflicting decisions cited in the Petition. These conflicting decisions cannot be reconciled with one another. The fact that at least two conflicting decisions from the Eighth and Ninth Circuits have been issued so far in 2010 demonstrates that conflicting interpretations of this Court's holdings in *BMW* and *State Farm* are spreading to additional courts and that it is highly unlikely that the conflicts will be resolved without the intervention of this Court.

This conflict among the lower courts is not just an intellectual curiosity. It has real world consequences for defendants.[2] The concerns of NABOB members are illustrative. For example, through its subsidiaries, one NABOB member owns or operates radio stations in 11 states and the District of Columbia, many of which broadcast into multiple states located in different federal courts of appeals circuits. It also owns other businesses which operate nationwide. If this NABOB member were to be successfully sued for compensatory damages, punitive damages and attorneys' fees, the amount of punitive damages that could be awarded consistent with this Court's holdings in *BMW* and *State Farm* would vary wildly, depending on where the NABOB member happened to get sued. The extent of punitive damage exposure consistent with the Constitution of the

[2] NABOB is considering the issue from the point of view of defendants because its members are concerned about the economic implications of inconsistent lower court decisions on whether attorneys fees should be included as compensatory damages when considering whether the amount of a punitive damage award is constitutional. A large punitive damage award can threaten the viability of many, if not most, businesses.

United States thus is subject to the happenstance of where a defendant is sued.

Such wildly different results under interpretations of the Constitution of the United States depending on the happenstance of where a suit is brought are antithetical to our form of constitutional government and can be prevented by this Court by the granting of certiorari in this case. Therefore, this Court should grant the petition for a writ of certiorari and resolve the present and growing conflict among the decisions of the lower courts.

CONCLUSION

For the foregoing reasons, in addition to those presented by the Petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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